Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS - - - Petitioner

versus

DONALD E. BORDENKIRCHER, Warden - Respondent

AND

JAMES WILLARD SUMMITT - - - Petitioner

versus

DONALD E. BORDENKIRCHER, Warden - Respondent

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Supreme Court of Kentucky published separate opinions for each petitioner. The opinions are reported in *Watkins* v. *Commonwealth,* Ky., 565 S. W. 2d 630 (1978) (Appendix, hereinafter designated App., pp. 35-37) and *Summitt* v. *Commonwealth,* Ky., 550 S. W. 2d 548 (1977) (App., pp. 112-116). In each petitioner's case the opinion of the United States District Court for the Western District of Kentucky is not reported (App., pp. 38-45, 117-120). The United States Court of Appeals for the Sixth Circuit con-

solidated each petitioner's case and its opinion is reported as *Summitt and Watkins* v. *Bordenkircher,* 608 F. 2d 247 (6th Cir. 1979) (App., pp. 47-58).

JURISDICTION

In each case the order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 (App., pp. 59, 122). The petitions for writs of certiorari were granted on March 17, 1980 (App., pp. 123-124). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether Constitutional Due Process Requires the Determination of the Admissibility of Evidence To Be Made Out of the Hearing of the Jury.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions petitioners have invoked are the Sixth and Fourteenth Amendments to the Federal Constitution.

COUNTERSTATEMENT OF THE CASES

Summitt v. *Bordenkircher*

Petitioner James Willard Summitt was indicted for rape in Jefferson County, Kentucky. Upon a jury verdict of guilty, Summitt was sentenced to life imprisonment (App. 111).

The Commonwealth's first witness was Detective Rick Sanders of the Jefferson County Police Department (App. 60). He stated that on July 21, 1974, at 11:30 p.m. he was called to interview a rape victim at Louisville General Hospital (App. 61-62). She described her assailant as a white male in his thirties, five feet, nine inches tall, one hundred and eighty to one hundred and ninety pounds, with a rough complexion and tattoos on both arms and was called "Jimbo." (App. 63). She looked at over 1200 pictures at the county police station the day of the rape but could not identify her attacker (App. 66) Next day she went to the city police station and went through several more photograph books (App. 68) . Upon finding Summitt's picture she stated, "This is the man that raped me. There's no doubt about it, this is Jimbo, the man that raped me." (App. 64). Detective Sanders further testified that the victim had reported that at 1:30 a.m. on July 21, 1974, Summitt forced her from a phone booth into a 1967-69 white Chevrolet with a black hard top and drove her to a gravel road where he raped her (TE 63-64).

The victim testified that while she was walking to a phone booth at the corner of Taylor Boulevard and Bicknell in Louisville, Kentucky, a man drove up and ordered her into the front seat of his car so that she was sitting between Summitt and another man (App. 71). She stated that it was shortly after midnight and she had just gotten off work from the Parkside Restaurant when she was abducted (App. 72). After driving out on a gravel road, Summitt told her to take

off her clothes and when she refused he hit her and raped her. *Id.* The two men then took her back to her car (App. 73). She stated that at the time of the rape, Summitt had a mustache and longer hair but she stated "I know it's definitely him." *Id.*

The victim stated that she had struck Summitt in the face "pretty hard" and that he started bleeding (App. 81). Summitt forcibly took off her clothes and she was raped in the front seat of the car (App. 82). She stated that she was with Summitt and his companion for about forty-five minutes (App. 85). She also stated that she had seen Summitt's face distinctly in the light on the night she was raped and that he was wearing a tank top and had tattoos on his arms (App. 97).

Summitt testified for the defense (App. 98). He stated that around August 14 or 15, his parole officer informed him that he had a warrant for his arrest for rape (TE 169). He stated that the first time he saw his alleged victim was in the courtroom (TE 166).

The court later requested that Summitt roll up his sleeves. He complied and exhibited the tattoos on his arms (App. 100).

Watkins* v. *Bordenkircher

Petitioner John Gregory Watkins was indicted for first-degree robbery in the attempted robbery of the Thoroughbred Liquor Store in Louisville, Kentucky and for first-degree assault in the wounding of an employee of the store, Donald L. Goeing, Sr., which occurred during the course of the attempted robbery.

Watkins was convicted on both counts and was sentenced to the maximum of twenty years on each count, the sentences to run concurrently (App. 33-34).

The Commonwealth's first witness was Walter Smith, an employee of the Thoroughbred Liquors (App. 7). He stated that around 11:30 p.m. on January 11, 1975, Watkins, along with three other men, entered his store and Watkins asked for a pack of cigarettes. *Id.* As Smith turned to obtain the cigarettes, Watkins announced that, "This is a hold-up." *Id.* Smith further testified that his co-worker, Donny Goeing, was putting soft drinks into a machine and when Watkins saw this movement by the machine, Watkins stated, "I said don't reach for anything" and shot Goeing twice (App. 9). After firing the shots, Watkins and his companions ran out the door (App. 10).

Smith further testified that he gave the police a description of Watkins as being a black male with a moustache and wearing a light-colored shirt. Watkins' companions had darker skin (App. 11-12). Smith stated that he saw Watkins' face when he turned around with the cigarettes (App. 10). He expressed no doubt whatsoever that Watkins was the man who had pulled out the gun and shot Goeing (App. 16).

The Commonwealth's next witness was Donald Goeing (App. 17). He stated that on January 11, 1975, at around 11:30 p.m., Watkins walked into the Thoroughbred Liquors. When Goeing turned around upon hearing Watkins state, "This is a hold-up," he was shot twice by Watkins (App. 18). Goeing made an

in-court identification of Watkins stating "I'd know his face any place." Id. Goeing testified that Watkins shot him once through the right ventrical of the heart and once through the arm. *Id.*

Goeing testified that he had been stocking the cooler with cold drinks and that he had been standing face to face with Watkins just prior to being shot (App. 19). He testified that the soft drink cooler was located to the side of the cash register (App. 20).

Goeing testified that he described his assailant to the police as wearing light tan clothing, having light skin coloring and being young (App. 21). Goeing further stated that he was in the hospital some twelve days and was told by the police that they were going to bring someone in to see if he could identify him (App. 21-22).

The Commonwealth's next witness was Officer Dennis Ferrell (App. 24). He testified that when he took Watkins to the hospital, Goeing identified him (App. 26). Officer Ferrell further testified that when he took Watkins down to the station for a lineup, there were three black males but that Watkins had lighter complexion than the other two (App. 26-27).

Watkins testified that he did not go into the Thoroughbred Liquor Store on the night of January 11, 1975, and denied that he had seen Goeing prior to seeing him in the hospital (App. 30-21).

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel at post-indictment confrontations is based on a critical stage of the proceedings. The reasoning behind such confrontations being a critical stage of the proceedings is just as applicable and supportive of concluding that in-camera determinations of the admissibility of evidence are not critical stages with attendant right of counsel.

A right to an in-camera hearing cannot be based upon an extension of the right to counsel where no right to counsel exists. There is no right to counsel at photographic identifications or at corporal confrontations during a routine police investigation. The standards of due process strike the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime. Due process is not violated by admission of identification testimony so long as the identification possesses sufficient aspects of reliability under the totality of the circumstances.

Petitioners were not denied due process by the trial courts' determination of admissibility in the presence of the jury. Petitioner Summitt's photographic identification procedure was devoid of any hint of suggestiveness. An in-camera hearing on a non-existent question of admissibility would frustrate rather than promote justice. Petitioner Watkins' in-court identifications were admissible under the Wade test of independent source. An in-camera hearing would have

answered this question before trial but the result would be a duplication of evidence needed by the jury on the issue of credibility.

Analysis of the facts present in each case indicates that under existing standards neither petitioner was denied his due process right of a fair trial with no substantial likelihood of an irreparable misidentification. A per se rule of exclusion in such instances peremptorily keeps evidence from the jury that's both reliable and relevant.

ARGUMENT

Constitutional Due Process Does Not Require the Determination of the Admissibility of Evidence To Be Made Out of the Hearing of the Jury.

A.

Each petitioner claims the trial court denied him a constitutional right by failing to hold a requested pretrial hearing. Prior to each trial each petitioner moved for an in-camera hearing. Petitioner Summitt based his motion on the fact he was identified from a photograph; Watkins claimed a right to have counsel present. Both of these motions were some time after exhaustive discovery proceedings had taken place. Following a lengthy discussion Watkins' motion was denied (Watkins T.E. pp. 2-11). Summitt's oral motion was denied at trial (App. 60). These denials of an in-camera determination of the admissibility of evidence lead petitioners to now claim that *United States* v. *Wade,* 388 U. S. 218 (1967) gives them a constitutional right to the hearing.

The constitutional ruling in *Wade* was an extension of the Sixth Amendment right to counsel outside the then traditional bounds of a trial. The rationale of that extension is just as forceful in determining that there is no compelling interest in extending that right to require an in-camera determination of the admissibility of evidence.

The nexus of *Wade* was that at this stage of confrontation the defendant alone could not cope with the power of the government. Further, it was likely that later, with counsel, he would be unable to cure any defects in the confrontation.

The rationale was later refined to apply only to in personam confrontations occurring after the initiation of adversarial proceedings where the defendant would be unable to cure any defects at trial. Simplifying this *Wade* "criticality" test, (1) there must be an *in personam* confrontation (2) after the initiation of adversarial proceedings (3) which cross-examination would be inadequate to cure at trial.

A lack of confrontation was essential in determining that the right to counsel did not extend to photographic identifications. The logistical problems involved could never be better illustrated than in Summitt's case. The necessity of counsel for each of the more than 1200 persons whose pictures were viewed would have been a chaotic burden on the orderly administration of justice.

Just as logical was the next element, the lack of "criticality" in preindictment situations where the

adversarial lines have not yet been drawn. This was of course the situation of petitioner Watkins.

If the first two elements are affirmatively present, then the final question is whether or not there are adequate means to cure any defects at trial. If it appears not, then there is a right to counsel at the confrontation. Should, as is the case for both petitioners, there be no post-indictment confrontation, there remain only the due process rights discussed below.

Analysis of the facts indicates that neither petitioner had a right to counsel at the identification process itself. There remains only the due process right that there be no substantial likelihood of irreparable misidentification. Application of the above test would indicate that cross-examination at trial, coupled with the available pretrial discovery and witness accessibility, would be adequate protection. Thus an in-camera hearing to determine the admissibility of evidence is not a critical confrontation mandating the right to counsel.

B.

Petitioners assert that due process requires an in-camera hearing on the admissibility of identification evidence as an extension of the Sixth Amendment right to counsel established in *United States* v. *Wade,* 388 U. S. 218 (1967). To analyze this claim it is necessary first to consider the policies and concerns *Wade* was designed to effectuate.

1. A historical view of *United States* v. *Wade* demonstrates the context of the Sixth Amendment guarantee of counsel.

Six weeks after Wade was indicted and two weeks after counsel was appointed Wade was compelled to appear in a lineup without any notice to his counsel. In determining this procedure violated Wade's right to counsel, this Court considered the traditional limitation of a right to counsel to the trial itself when a defendant for the first time confronted his accusers and the evidence against him. The historical context was compared to current practices with organized police forces where critical confrontations of the accused by the prosecution occur at pretrial proceedings, the results of which often settle the accused's fate and reduce the trial to a mere formality. The general rule was that an accused is entitled to the presence of counsel at, or else the exclusion of any evidence derived from, a critical pretrial confrontation where the accused stands alone against the overwhelming resources of the state and the absence of counsel would deny him effective representation at the only stage when legal aid and advice would help him. Examples of such confrontations include: the arraignment where defenses were lost if not then asserted,[1] secretly arranged and overheard meetings with an accomplice turned informant[2] and custodial interrogations.[3]

Post-indictment lineups and showups were considered "critical stage" confrontations because of the

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[1] *Powell* v. *Alabama*, 287 U. S. 45 (1932).
[2] *Massiah* v. *United States*, 377 U. S. 201 (1964).
[3] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

history of suggestiveness in the manner the accused was presented to witnesses, the secrecy surrounding such confrontations with a resulting gap in knowledge, and the accused's inability to credibly reconstruct for the jury any suggestiveness or unfairness in the confrontation procedure.

The accused not only might not recognize or appreciate any suggestiveness in the procedure but also would be faced with the dilemma of foregoing his right not to testify in order to present this evidence. Given the secrecy, the gap in knowledge and the inability to reconstruct the critical pretrial confrontation, "the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Wade* at 235. No substantial countervailing policy against a right to counsel at post-indictment lineups and showups was advanced. In *Wade,* and in *Gilbert* v. *California,* 388 U. S. 263 (1967), counsel had already been appointed and no argument was made that notice to counsel would have prejudicially delayed the confrontations.

This Court acknowledged that legislation or regulations which eliminated "the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" *Wade* at 239. More systematic or scientific proceedings were encouraged to lessen the impediment to reconstruction of the conditions bearing upon the reliability of the process.

Five years later this Court declined to extend the *per se* exclusionary rule to a police station showup occurring before the defendant was formally charged. The Sixth and Fourteenth Amendment right to counsel is applicable only to "criminal prosecutions." *Kirby* v. *Illinois,* 406 U. S. 682, 690 (1972).[4] The delay accompanying a constitutional right to counsel would likely impede prompt investigations, cause extended detention of innocent suspects and diminish the reliability of identification as the witness's memory fades.

The next year it was held that the Sixth Amendment does not guarantee a right to counsel at photographic identification displays. *United States* v. *Ash,* 413 U. S. 300 (1973). Photographic identifications were considered analogous to pretrial interviews with witnesses. No confrontation is involved and the subsequent trial provides adequate opportunities to cure any defects from inadvertent suggestiveness or abuse; i.e., the photographic display is not a "critical" confrontation. In *Ash,* this Court cautioned against the drastic expansion of the right to counsel which would result if the *Wade* test were applied out of context.

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[4]For it is only [at or after the initiation of judicial criminal proceedings] that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.

* * *

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. *Kirby* at 689-690.

2. Petitioners were not entitled to the presence of counsel at the identification procedures.

It is clear from the foregoing analysis that petitioners were not deprived of a right to counsel at a critical pretrial confrontation. Indeed, no such claim is made. Summitt was identified from more than 1200 photographs viewed by his victim within two days of the incident. Watkins was identified by a critically wounded robbery victim at a hospital showup and then by another victim at a lineup. All identifications occurred during routine investigatory stages before adversary proceedings were formally initiated, and long before indictments were returned.[5]

Wade was deprived of his right of cross-examination because of inequality in the adversary process at a critical pretrial confrontation. Petitioners were not similarly handicapped. While they claim they were forced at trial to "probe in the dark in an attempt to discover and reveal unfairness," the record reflects that a great deal of light had been shed on the identification proceedings prior to trial. Summitt moved for and was granted discovery of all photographs viewed by his rape victim (Summitt TE 7-9, 12). Similarly, Watkins discovered and introduced at trial a photograph of the lineup and information concern-

[5]Petitioner Summitt was identified by photo on July 23, 1974, two days after the rape occurred. He was arrested after July 31 and indicted September 19, 1974 (TE 63-64, 233; App. 2).

Petitioner Watkins was identified January 13, 1975, two days after the robbery. Charges were placed against him after the identifications. He was indicted March 25, 1975 (TE 59, 61, 64; App. 1).

ing the hospital showup (Watkins TR 3-6, 11-13, 19-22; App. 76). The defense counsel had equal access with the prosecutor to witnesses for pretrial interviews, an equal opportunity to reconstruct the identification procedures for the jury, and an equal opportunity to attack the credibility of evidence through cross-examination. Petitioners' claims of impediments to meaningful cross-examination are not supported by the records.

The historical spirit and continuing purpose of the Sixth Amendment guarantee of counsel is to remove inequality in the adversary process, not to protect against prosecutorial abuse. *Ash, supra* at 319-320. In those identification cases where the right to counsel is not applicable, this Court has consistently held that due process standards provide adequate safeguards against prosecutorial abuse or suggestive identification procedures.[6]

3. Due Process does not compel a *per se* requirement of an in-camera hearing on identification procedures to protect against the likelihood of misidentification.

Petitioners argue that the standards of due process compel a *per se* constitutional requirement of an in-camera hearing on identification testimony when re-

[6] *Stovall* v. *Denno*, 388 U. S. 293 (1967) (a hospital showup the day following the crime); *Simmons* v. *United States*, 390 U. S. 377 (1968); *Kirby* v. *Illinois*, 406 U. S. 682 (1972) (a preindictment police staion showup); *United States* v. *Ash*, 413 U. S. 300 (1973) (a post-indictment photographic display); *Neil* v. *Biggers*, 409 U. S. 188 (1972) (a preindictment station-house showup); *Manson* v. *Brathwaite*, 432 U. S. 98 (1977) (a photographic showup).

quested by the defendant. But the cure sought by petitioners proves worse than the disease. Such a requirement would bog down already overcrowded court dockets with hearings in cases where there was no indicia of suggestive identification procedure.

An example of this is apparent in Summitt's frivolous demand for a hearing. The victim, having viewed the rapist for about 45 minutes, gave a very accurate description including the tattoo portion to the police prior to the photo viewing. She unequivocally identified Summitt as soon as she saw his picture and did not identify anyone prior to that. Since defense counsel knew or had access to all of this information, he was aware that any question of admissibility was non-existent. All that remained was the jury question of credibility.

Similarly, in-camera hearings would be required when the pretrial procedure was suggestive but necessary and otherwise reliable, as in *Stovall* v. *Denno,* 388 U. S. 293 (1967). Much of the evidence relevant to the issue of admissibility is also relevant to the issue of credibility and would have to be repeated before the jury. When there is no indication that identification testimony would be inadmissible, the in-camera hearing would be not only a time-consuming duplication but also an exercise in futility. If this Court should accept petitioners' claims and remand the cases for hearings, what possible effect would the hearings have? Absolutely none. The record in Watkins establishes the in-court identifications were admissible under the *Wade* test of independent source. De-

fense counsel had the information necessary to wage an effective attack on the witnesses' identification testimony at trial. The record also reflects that the original motions for suppression hearings provided no facts to support a belief that any in-court identification was irreparably tainted by unnecessary and suggestive pretrial procedures (App. 3, 60). The trial court did not abuse its discretion by denying the motions for in-camera hearings.

It must be remembered that "it is the likelihood of misidentification which violates a defendant's right to due process." *Neil* v. *Biggers,* 409 U. S. 188, 198 (1972). The due process test of *Stovall, supra,* protects an *evidentiary* interest.[7]

Wade and its companion cases reflected three concerns. The first was that "the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson* v. *Brathwaite,* 432 U. S. 98, 112 (1977). While an in-camera hearing furthers this policy, a *per se* constitutional requirement goes too far. If ex-

[7]It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process.

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi. *Manson* v. *Brathwaite,* 432 U. S. 98, 113 (1977) (footnote 14) (citations omitted).

perience is any guide, it is the rare case in which the identification procedures are violative of due process,[8] yet an in-camera hearing will be required in *every* case where the defendant requests it. The concerns of reliability can be adequately met by a flexible standard of trial court discretion to hold a hearing or to declare a mistrial when the interest of justice requires. Appellate review would still be available under due process standards.

The second factor was deterrence. It is difficult to see how this factor would be affected one way or the other by removing the admissibility hearing from the jury's presence.

The third factor is "the effect on the administration of justice." It is here that the *per se* approach must fail. If identification testimony is to be subject to an in-camera hearing solely because it may be unreliable, then what would preclude a similar requirement for all potentially unreliable evidence? Should all witnesses' testimony be subject to an in-camera hearing? Must the admissibility of all evidence be decided prior to trial when requested? Shall we have two separate trials, one for admissibility and one for credibility? Just how far do we go and still have a trial which protects both society and the defendant? Court dockets are crowded enough without adding hearings which are largely duplicative and serve little purpose.

In short, cross-examination at trial provides the necessary confrontation to test the reliability of evidence. Trial courts have discretion to hold hearings

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[8]See *Foster* v. *California*, 394 U. S. 440 (1969).

out of the presence of the jury when the interest of justice requires. Due process standards protect against the substantial likelihood of irreparable misidentification. A constitutional requirement of in-camera hearings on the admissibility of evidence is not warranted.

C.

Jackson v. *Denno,* 378 U. S. 368 (1964) does not support a requirement for an in-camera hearing on the admissibility of identification evidence. Petitioner equates the determination of admissibility of identification evidence in the presence of the jury with the rule struck down in *Jackson.* There the jury determined not only the reliability of a confession but also its voluntariness or admissibility as evidence.

The two situations are not comparable. Unlike a coerced confession, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Considerations urging the exclusion of evidence tainted by a constitutional violation do not bear on the present question.

Nor does the jury determine the admissibility of identification evidence as was the case with confessions in *Jackson.* That procedure was condemned on the grounds that due process is violated if a conviction is based, even in part, upon an involuntary confession. *Id.* at 376. Since the *Jackson* jury was required to carefully consider the confession, decide the legal question of its voluntariness and then decide the factual question of its credibility, it could not be assumed that

the jury made a reliable determination of voluntariness. *Id.* at 386-387.

By contrast, the admissibility of identification evidence, like any other evidence, is determined by the judge upon timely objections at trial. If the objection is sustained, the evidence is not heard or is stricken or a mistrial is declared, depending upon which relief is sought and the prejudice caused. These rulings are binding upon the jury and are subject to appellate review. Only when evidence is ruled admissible by the judge may the jury then decide the factual issue of credibility or weight of the evidence.

Petitioners were perhaps confused because in identification cases the word "reliability" is often used to describe both the test for admissibility (the legal question) and the test for credibility (the factual question). Although much of the same evidence may bear on both issues, the determinations are separate and distinct, the former being made by the judge and the latter by the jury. Respondent submits that when this Court concluded "reliability is the linchpin in determining the admissibility of identification testimony,"[9] it in no way implied that admissibility is a question for the jury as petitioners infer in their Brief.

The holding of *Jackson* was that convictions could not be based on involuntary confessions. *Id.* at 376. Under these circumstances, it is not surprising that in *Pinto* v. *Pearce,* 389 U.S. 31 (1967) it was stated, "it would seem *prudent* to hold voluntariness hearings out of the presence of the jury." (Emphasis added.) Pru-

[9] *Manson* v. *Brathwaite,* 432 U. S. 98, 114 (1977).

dent practice does not translate into a *per se* constitutional requirement.[10]

Since convictions can be upheld despite suggestive identification procedures and since evidence on admissibility is also relevant to credibility, strong arguments can be advanced for holding admissibility hearings in the presence of the jury.

Petitioners' reliance upon *Jackson* v. *Denno* is misplaced. The circumstances surrounding determinations of admissibility are not comparable and, in fact, lead to the opposite conclusions.

D.

Petitioners were of course entitled to their due process rights of a fair trial and since in identification

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[10]Federal Rule of Evidence 104(c):

Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

Advisory Committee's Note

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

cases it is the likelihood of misidentification which violates a defendant's right to due process, we should examine each case.

In this analysis we utilize the factors set forth in *Neil* v. *Biggers,* 409 U. S. 188 (1972).[11] These factors are applicable only if the prior lineup or showup was suggestive. The prior identification of Summitt was not suggestive. The victim identified her assailant from over 1,200 photographs viewed two days after the rape. The police were not with her during the viewing. Defense counsel's hearing request was frivolous on its face. In *Watkins,* the hearing request was not based on alleged suggestiveness of the lineup at the police station and showup at the hospital, but rather on the absence of counsel. However, when viewed in light of the facts of the case, that hearing request was also frivolous.

In spite of the fact that the requests were frivolous, the factors may be applied as follows:

SUMMITT *v.* BORDENKIRCHER

(1) *The victim's opportunity to view Summitt.*

The victim testified that she was in the company of Summitt for about forty-five (45) minutes from the time she was forced into Summitt's car until she was

[11] [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior descripion of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Biggers* at 199-200.

returned to her car after Summitt had raped her (App. 85). She stated that she was forced to sit in the front seat of the car wedged in between Summitt and another man (App. 71) and although the rape had occurred after midnight, at times she was able to clearly see his face in the light (App. 97). She testified that when Summitt struck her, she struck him back causing his face to bleed (App. 81).

(2) *The victim's degree of attention.*

The victim fought with her assailant when he tried to take off her clothes and rape her (App. 81). She was able to describe in detail where she was driven prior to the rape (TE 63-65; App. 78-80).

(3) *The accuracy of the victim's prior description of Summitt.*

The victim described her assailant as a white male in his thirties, five feet, nine inches tall, one hundred and eighty to one hundred and ninety pounds with a rough complexion and tattoos on both arms (App. 63).

Summitt testified at trial that he was thirty-four years of age (TE 157) and at the court's request he displayed his tattoos to the jury (App. 100). She stated that at the time of the rape, Summitt had a mustache and longer hair but added "I know its definitely him" (App. 73). She stated that Summitt was wearing a tank top on the night of the rape.

(4) *The victim's level of certainty demonstrated at the out-of-court identification.*

When the victim came across Summitt's photograph at the police station, she positively identified Summitt

and had no doubt whatsoever that he was the man who had raped her (App. 64). She identified Summitt from some 1,200 photographs (App. 67).

(5) *The length of time between the crime and the out-of-court identification.*

The victim identified Summitt from his photograph two days after she had been raped (App. 64).

WATKINS *v.* BORDENKIRCHER

(1) *Opportunity to view at the time of the crime.*

Walter Smith testified that he was working behind the counter of the liquor store when Watkins came up to the counter and asked for a pack of cigarettes (App. 7). When he turned to get the cigarettes and then turned back around Watkins pronounced that it was a "hold-up" and was holding a .38 caliber pistol (App. 10). Smith testified that his partner, Donald Goeing, was putting cold drinks into a machine and when Watkins saw movement by the machine he shot Goeing twice (App. 9).

Donald Goeing testified that he and Walter Smith were both working behind the counter when Watkins walked into the liquor store and ordered a pack of cigarettes (App. 18). He then heard Watkins state, "This is a hold-up" and when Goeing turned around, he was shot twice by Watkins.

(2) *The witness' degree of attention.*

Smith testified that he was waiting on Watkins who asked for a pack of cigarettes at the time Watkins shot

Goeing (App. 7-9). There were no other customers in the store at the time of the shooting (App. 10). However, Smith noticed that Watkins was accompanied by three other men (App. 7). Goeing testified that he also heard Watkins pronounce that this was a "hold-up" moments before he was shot (App. 18). He further stated that he had been standing "face to face" with Watkins just prior to the shooting (App. 19).

(3) *The accuracy of the prior descriptions.*

Smith gave a description to the police that Goeing's assailant was a black male with a moustache who had a somewhat light conplexion (App. 11-12). He recalled he may have told the police that Watkins was "around 30" when in fact Watkins was seventeen years of age at the time of the shooting (App. 13, 31).

Goeing testified that his assailant was young and had light skin coloring (App. 21).

(4) *Level of certainty demonstrated at the confrontation.*

Smith picked out Watkins at a lineup of three black males (App. 26).

Goeing identified Watkins from his hospital bed but also stated that "it could have been his twin brother" (App. 23-26).

(5) *Length of time between the crime and the confrontation.*

Smith identified Watkins in a lineup two days after the shooting (TE 59, 61).

Goeing identified Watkins from his hospital bed on the day Watkins was arrested about two days after the shooting (App. 25-26).

These factors do not suggest, as petitioners claim, that they were entitled to a hearing out of the presence of the jury. In fact, they indicate that the likelihood of irreparable misidentification was non-existent.

E.

Petitioners' advocacy for a rigid exclusionary rule with regards to any and all "suggestive evidentiary identification procedures," has been considered previously by this Court. "Certainly, inflexible rules of exclusion, that may frustrate rather than promote justice, have not been viewed recently by this Court with unlimited enthusiasm." *Manson, supra* at 113. Flexibility is inherent and indeed required by due process considerations.

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature. *Manson* at 116.

Again, the lens through which we must view the evidence is the "totality of the circumstances"[12] with

[12]The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment. Stovall, with its reference to the *"totality of the circumstances"* and Biggers, with its continuing stress on the same totality, did not, singly or together, establish a strict exclusionary rule or new standard of Due Process. . . . We therefore conclude that *reliability* is the linchpin in determining the admissibility of

(Footnote continued on following page)

the issue being whether the identification was so unreliable as to create a substantial likelihood of misidentification.

In commenting on due process, the Sixth Circuit said in *Summitt:*

> A defendant is denied due process *only when the identification evidence is so unreliable that its introduction renders a trial unfair.* As long as there is not a *substantial likelihood of misidentification,* it is the function of the jury to determine the ultimate weight to be given the identification. At 253 (emphasis added)

Where the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

The focus upon "reliability" and on analogous factual situations are further evidenced and buttressed by *Biggers.*

The facts in *Biggers* provide for an interesting comparison with the present case. In *Biggers,* where the defendant was accused of rape as in *Summitt,* the victim had spent considerable time with her assailant, had given the police a description of him, and testified

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(Footnote continued from preceding page)

identification testimony for both pre and post Stovall confrontations. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. *Manson* at 114 (emphasis added).

at the trial that she had *"no doubt"* about her identification of the accused and that there was *something about his face "I don't think I could ever forget."* (emphasis added).

In *Watkins,* witness Donald Goeing stated emphatically upon identifying defendant in court, *"I'd know his face anyplace"* (emphasis added), and in *Summitt,* the witness-victim stated unequivocally, after examining numerous photographs, *"This is the man that raped me. There's no doubt about it, this is Jimbo, the man that raped me."* (emphasis added).

We submit that the due process standard to which all eyewitness evidentiary evidence must be measured is one of relevancy and reliability. As so aptly stated in *Manson:* ". . . the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." At 106. Again, in neither of these cases were there suggestive or unnecessary identification procedures. In such instances, a *per se* rule of exclusion would go too far since its application automatically and peremptorily keeps evidence from the jury that is reliable and relevant.

Given this analysis and the emphasis on reliability, together with the evidence at trial, it is strongly submitted that an in-camera hearing to determine admissibility of eyewitness identification testimony is not constitutionally mandated. The identification evidence introduced at trial was sufficiently reliable to eliminate

any substantial likelihood of irreparable misidentification when viewed in light of the totality of the circumstances of these cases.

CONCLUSION

The respondent submits that there is no constitutional due process right to have the admissibility of evidence determined outside the hearing of the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor Fox, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioners by depositing three copies of same in the United States mail, first class postage prepaid, on August 14, 1980, addressed to counsel for petitioners, Hon. Frank W. Heft, Jr., Chief Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202.

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